



RECEIVED
OFFICE OF
PAT MILLER

MAR 01 2005
2:51 PM

February 28, 2005

TN REGULATORY AUTHORITY

Dear Commissioner:

Enclosed is a copy of the letter that LecStar Telecom submitted to BellSouth on February 24, 2005 in regards to their Carrier Notice Letter SN91085039 for your review

Thank you,
Michael E Britt
Vice President – Regulatory Affairs



A Fonix Telecom Company

2 Ravinia Drive, Suite 1300
Atlanta, GA 30346

February 24, 2005

**VIA OVERNIGHT MAIL AND
EMAIL**

Mr. Jerry Hendrix
Assistant V.P. Interconnection Services
675 West Peachtree Street
Atlanta, GA 30375

Ms. Vicki Wright
Negotiator-Interconnection Services
675 West Peachtree Street
Atlanta, GA 30375

RE: Carrier Notice Letter SN91085039

Dear Mr. Hendrix and Ms. Wright:

BellSouth Telecommunications, Inc.'s ("BellSouth's") carrier notice letter dated February 11, 2005 outlines actions that BellSouth plans to take that are directly opposed to the FCC's Order released on February 4, 2005 in Docket No. WC 04-313 and CC 01-338 ("TRRO"). The TRRO, scheduled to become effective March 11, 2005, contrary to the assertions in your carrier notice, does not allow BellSouth to refuse UNE-P Move, Add & Change orders associated with the embedded base of UNE-P customers or orders for new UNE-P customers on its effective date. Indeed for all three elements (switching, high capacity loops and transport) the FCC establishes a transition period and requires the parties to use the change of law processes outlined in our existing interconnection agreement. As you are aware, the change of law provisions in our existing contract provide for good faith negotiations between the parties to implement a material change of law¹

This letter constitutes notice to BellSouth on behalf of LecStar Telecom, Inc. ("LecStar") that if BellSouth undertakes the actions outlined in the carrier notice letter then (1) BellSouth is in breach of our existing interconnection agreement and (2) BellSouth will be in violation of the FCC Order and will be causing irreparable harm to LecStar by failing to process orders for our existing base of UNE-P customers.

¹ See Exhibit A containing the applicable pages from our interconnection agreement.

By immediate response to this letter, we request assurances from BellSouth of its intent to comply with the terms of our existing interconnection agreement. LecStar is prepared to participate immediately in good-faith negotiations regarding the changes in the law reflected in the TRRO in each of the 9 BellSouth states we serve with UNE-P lines.

The TRRO provides for a twelve-month transition period, effective March 11, 2005 for the conversion of UNE-P to alternative facilities, applicable to the embedded customer base. TRRO, at ¶¶ 227-28. With regard to transition of the embedded customer base, the TRRO provides for the parties to negotiate during the twelve-month period pursuant to the change of law provisions in their interconnection agreements, and for a true-up, retroactive to March 11, 2005 of the difference between the rates in the parties' interconnection agreement and the transition rates decreed by the TRRO. *See id.*, at ¶ 227, n.630.

The FCC further states that the transition period is not applicable to *new* UNE-P lines added after March 10, 2005, but the FCC adds a qualifying phrase:

This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3) except as otherwise specified in this Order.

Id., at ¶ 227. There would have been no reason for the FCC's reference to other sections of the TRRO if the FCC had intended that CLECs were categorically prohibited from adding new UNE-P lines pursuant to section 251 as of the effective date of the TRRO.

As "specified", the TRRO requires parties to interconnection agreements to follow the change of law procedures in those documents. The FCC states that:

carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes. By the end of the twelve month period, requesting carriers must transition the affected mass market local circuit switching UNEs to alternative facilities or arrangements.

Id. The FCC also states:

We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusion to this Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, *the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes.* We expect that *parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order.* We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.

Id. At ¶ 233.

February 23, 2005

Page 3

Consequently, the FCC purports neither to abrogate existing contracts with respect to their change of law provisions in interconnection agreements, nor to preempt state commission jurisdiction with regard to enforcement or amendment of those agreements. In fact, the TRRO by its own terms recognizes that as of March 11, 2005, subject to terms of their interconnection agreements, CLECs will be able to add new UNE-P customers, provided that the parties to those agreements embark in negotiations in good faith and without unreasonable delay. To hold otherwise would fail to affect the FCC's intent, as evinced by a reading of the "four corners" of the TRRO.

Although BellSouth cites the phrase italicized above from paragraph 227 of the TRRO, BellSouth in essence maintains that the phrase's reference is merely to the continued providing of switching *pursuant to commercial agreements*. (See the top of page 2 of the carrier notification.) The FCC's reference, however, is to continued unbundling of network elements pursuant to 47 U.S.C. 251(c), which BellSouth maintains does not apply to local circuit switching after March 10, 2005 and does not apply to commercial agreements. Hence BellSouth's argument on this point is contradictory.

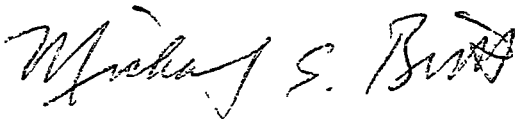
LecStar seeks to negotiate the issues and terms and conditions of the transition as part of the Interconnection agreement amendment. There are substantial unresolved issues, based upon the February 22 UNE Users Group conference call and the contradictions with the statements of BellSouth General Counsel Ms. Lisa Foshee before the Georgia Public Service Commission (GPSC) Communications Committee that remain unresolved and will be important issues to establish between the companies with respect to the transition from UNE-P services in the form of a negotiated amendment.

With regard to high capacity loops and transport, LecStar is heartened to hear Ms. Foshee's comments today before the GPSC regarding self-certification for loops and transport subject to CLEC due diligence. LecStar requests that BellSouth provide the supporting data necessary to make such a determination on a route by route basis including the list of fiber based collocators, their contact information and the methodology for calculating the number of business lines in each wire center.

In conclusion, if BellSouth does not retract its position outlined in the carrier notification letter by no later than Thursday March 3, 2005, and provide LecStar with reasonable assurance of BellSouth's intent to comply with the terms of the interconnection agreement, LecStar will need to pursue those legal remedies that will afford protection to its business and its customers and to prevent irreparable harm to our business. In light of the urgent need for relief, LecStar also intends to file Emergency Motions for Relief before various state public service commissions

I look forward to your timely response.

Very truly yours,



Michael E. Britt
Vice President - Regulatory Affairs

cc: State Commissions
FCC Wireline Bureau

and for no other entry or purpose, except as may be otherwise agreed to in writing by the Parties. Nothing herein shall prohibit Recipient from providing information requested by the FCC or a state regulatory agency with jurisdiction over this matter, or to support a request for arbitration or an allegation of failure to negotiate in good faith.

- 10.5 Recipient agrees not to publish or use the Information for any advertising, sales promotions, press releases, or publicity matters that refer either directly or indirectly to the Information or to the Discloser or any of its affiliated companies.
- 10.6 The disclosure of Information neither grants nor implies any license to the Recipient under any trademark, patent, copyright, or application that is now or may hereafter be owned by the Discloser.
- 10.7 Survival of Confidentiality Obligations The Parties' rights and obligations under this Section 10 shall survive and continue in effect until two (2) years after the expiration or termination date of this Agreement with regard to all Information exchanged during the term of this Agreement. Thereafter, the Parties' rights and obligations hereunder survive and continue in effect with respect to any Information that is a trade secret under applicable law.
- 10.8 Assignments. Any assignment by either Party to any non-affiliated entity of any right, obligation or duty, or of any other interest hereunder, in whole or in part, without the prior written consent of the other Party shall be void. A Party may assign this Agreement or any right, obligation, duty or other interest hereunder to an Affiliate of the Party without the consent of the other Party; provided, however, that the assigning Party shall notify the other Party in writing of such assignment thirty (30) days prior to the Effective Date thereof and, provided further, if the assignee is an assignee of Momentum, the assignee must provide evidence of Commission CLEC certification. The Parties shall amend this Agreement to reflect such assignments and shall work cooperatively to implement any changes required due to such assignment. All obligations and duties of any Party under this Agreement shall be binding on all successors in interest and assigns of such Party. No assignment or delegation hereof shall relieve the assignor of its obligations under this Agreement in the event that the assignee fails to perform such obligations.

11. Resolution of Disputes

Except as otherwise provide herein, any dispute, controversy or claim (individually and collectively, a "Dispute") arising under this Agreement shall be resolved in accordance with the procedures set forth in this Section. In the event of a Dispute between the Parties relating to this Agreement, and upon the written request of either Party, each of the Parties shall appoint within ten (10) calendar days after a Party's receipt of such request, a designated representative who has authority to settle the Dispute and negotiate in good faith in an effort to resolve such Dispute. The specific format for such discussions will be left to the discretion of the designated representatives; however, all reasonable requests for relevant

information made by one Party to the other Party shall be honored. If the Parties are unable to resolve issues related to a Dispute within thirty (30) days after a Party's request is made for appointment of designated representatives as set forth above, either Party may petition the appropriate state regulatory agency, the FCC. However, each Party reserves any rights it may have to seek judicial review of any ruling made by the Commission concerning this Agreement. Notwithstanding the foregoing, in no event shall the Parties permit the pendency of a valid, good faith Dispute to disrupt service to any Momentum or BellSouth End User, unless such service is damaging or interfering with customer services or network operations.

12. Taxes

12.1 Definition. For purposes of this Section, the terms "taxes" and "fees" shall include but not be limited to federal, state or local sales, use, excise, gross receipts or other taxes or tax-like fees of whatever nature and however designated (including tariff surcharges and any fees, charges or other payments, contractual or otherwise, for the use of public streets or rights of way, whether designated as franchise fees or otherwise) imposed, or sought to be imposed, on or with respect to the services furnished hereunder or measured by the charges or payments therefore, excluding any taxes levied on income.

12.2 Taxes and Fees Imposed Directly On Either Providing Party or Purchasing Party.

12.2.1 Taxes and fees imposed on the providing Party, which are not permitted or required to be passed on by the providing Party to its customer, shall be borne and paid by the providing Party.

12.2.2 Taxes and fees imposed on the purchasing Party, which are not required to be collected and/or remitted by the providing Party, shall be borne and paid by the purchasing Party.

12.3 Taxes and Fees Imposed on Purchasing Party But Collected And Remitted By Providing Party.

12.3.1 Taxes and fees imposed on the purchasing Party shall be borne by the purchasing Party, even if the obligation to collect and/or remit such taxes or fees is placed on the providing Party.

12.3.2 To the extent permitted by applicable law, any such taxes and/or fees shall be shown as separate items on applicable billing documents between the Parties. Notwithstanding the foregoing, the purchasing Party shall remain liable for any such taxes and fees regardless of whether they are actually billed by the providing Party at the time that the respective service is billed.

flood, earthquake or like acts of God, wars, revolution, civil commotion, explosion, acts of public enemy, embargo, acts of the government in its sovereign capacity, labor difficulties, including without limitation, strikes, slowdowns, picketing, or boycotts, unavailability of equipment from vendor, changes requested by Customer, or any other circumstances beyond the reasonable control and without the fault or negligence of the Party affected, the Party affected, upon giving prompt notice to the other Party, shall be excused from such performance on a day-to-day basis to the extent of such prevention, restriction, or interference (and the other Party shall likewise be excused from performance of its obligations on a day-to-day basis until the delay, restriction or interference has ceased); provided however, that the Party so affected shall use diligent efforts to avoid or remove such causes of non-performance and both Parties shall proceed whenever such causes are removed or cease.

14. Adoption of Agreements

BellSouth shall make available, pursuant to 47 USC § 252 and the FCC rules and regulations regarding such availability, to Momentum any interconnection, service, or Network Element provided under any other agreement filed and approved pursuant to 47 USC § 252, provided a minimum of six months remains on the term of such agreement. The Parties shall adopt all rates, terms and conditions concerning such other interconnection, service or network element and any other rates, terms and conditions that are legitimately related to or were negotiated in exchange for or in conjunction with the interconnection, service or network element being adopted. The adopted interconnection, service, or network element and agreement shall apply to the same states as such other agreement. The term of the adopted agreement or provisions shall expire on the same date as set forth in the agreement that was adopted.

15. Modification of Agreement

- 15.1 If Momentum changes its name or makes changes to its company structure or identity due to a merger, acquisition, transfer or any other reason, it is the responsibility of Momentum to notify BellSouth of said change and request that an amendment to this Agreement, if necessary, be executed to reflect said change.
- 15.2 No modification, amendment, supplement to, or waiver of the Agreement or any of its provisions shall be effective and binding upon the Parties unless it is made in writing and duly signed by the Parties.
- 15.3 In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of Momentum or BellSouth to perform any material terms of this Agreement, Momentum or BellSouth may, upon written notice require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within ninety (90) days after such notice, the Dispute shall be referred to the Dispute Resolution procedure set forth in this Agreement.

and for no other entity or purpose, except as may be otherwise agreed to in writing by the Parties. Nothing herein shall prohibit Recipient from providing information requested by the FCC or a state regulatory agency with jurisdiction over this matter, or to support a request for arbitration or an allegation of failure to negotiate in good faith.

- 10.5 Recipient agrees not to publish or use the Information for any advertising, sales promotions, press releases, or publicity matters that refer either directly or indirectly to the Information or to the Discloser or any of its affiliated companies.
- 10.6 The disclosure of Information neither grants nor implies any license to the Recipient under any trademark, patent, copyright, or application that is now or may hereafter be owned by the Discloser.
- 10.7 Survival of Confidentiality Obligations The Parties' rights and obligations under this Section 10 shall survive and continue in effect until two (2) years after the expiration or termination date of this Agreement with regard to all Information exchanged during the term of this Agreement. Thereafter, the Parties' rights and obligations hereunder survive and continue in effect with respect to any Information that is a trade secret under applicable law.
- 10.8 Assignments. Any assignment by either Party to any non-affiliated entity of any right, obligation or duty, or of any other interest hereunder, in whole or in part, without the prior written consent of the other Party shall be void. A Party may assign this Agreement or any right, obligation, duty or other interest hereunder to an Affiliate of the Party without the consent of the other Party; provided, however, that the assigning Party shall notify the other Party in writing of such assignment thirty (30) days prior to the Effective Date thereof and, provided further, if the assignee is an assignee of Momentum, the assignee must provide evidence of Commission CLEC certification. The Parties shall amend this Agreement to reflect such assignments and shall work cooperatively to implement any changes required due to such assignment. All obligations and duties of any Party under this Agreement shall be binding on all successors in interest and assigns of such Party. No assignment or delegation hereof shall relieve the assignor of its obligations under this Agreement in the event that the assignee fails to perform such obligations.

11. Resolution of Disputes

Except as otherwise provide herein, any dispute, controversy or claim (individually and collectively, a "Dispute") arising under this Agreement shall be resolved in accordance with the procedures set forth in this Section. In the event of a Dispute between the Parties relating to this Agreement, and upon the written request of either Party, each of the Parties shall appoint within ten (10) calendar days after a Party's receipt of such request, a designated representative who has authority to settle the Dispute and negotiate in good faith in an effort to resolve such Dispute. The specific format for such discussions will be left to the discretion of the designated representatives; however, all reasonable requests for relevant

information made by one Party to the other Party shall be honored. If the Parties are unable to resolve issues related to a Dispute within thirty (30) days after a Party's request is made for appointment of designated representatives as set forth above, either Party may petition the appropriate state regulatory agency, the FCC. However, each Party reserves any rights it may have to seek judicial review of any ruling made by the Commission concerning this Agreement. Notwithstanding the foregoing, in no event shall the Parties permit the pendency of a valid, good faith Dispute to disrupt service to any Momentum or BellSouth End User, unless such service is damaging or interfering with customer services or network operations.

12. Taxes

12.1 Definition. For purposes of this Section, the terms "taxes" and "fees" shall include but not be limited to federal, state or local sales, use, excise, gross receipts or other taxes or tax-like fees of whatever nature and however designated (including tariff surcharges and any fees, charges or other payments, contractual or otherwise, for the use of public streets or rights of way, whether designated as franchise fees or otherwise) imposed, or sought to be imposed, on or with respect to the services furnished hereunder or measured by the charges or payments therefore, excluding any taxes levied on income.

12.2 Taxes and Fees Imposed Directly On Either Providing Party or Purchasing Party.

12.2.1 Taxes and fees imposed on the providing Party, which are not permitted or required to be passed on by the providing Party to its customer, shall be borne and paid by the providing Party.

12.2.2 Taxes and fees imposed on the purchasing Party, which are not required to be collected and/or remitted by the providing Party, shall be borne and paid by the purchasing Party.

12.3 Taxes and Fees Imposed on Purchasing Party But Collected And Remitted By Providing Party.

12.3.1 Taxes and fees imposed on the purchasing Party shall be borne by the purchasing Party, even if the obligation to collect and/or remit such taxes or fees is placed on the providing Party.

12.3.2 To the extent permitted by applicable law, any such taxes and/or fees shall be shown as separate items on applicable billing documents between the Parties. Notwithstanding the foregoing, the purchasing Party shall remain liable for any such taxes and fees regardless of whether they are actually billed by the providing Party at the time that the respective service is billed.

flood, earthquake or like acts of God, wars, revolution, civil commotion, explosion, acts of public enemy, embargo, acts of the government in its sovereign capacity, labor difficulties, including without limitation, strikes, slowdowns, picketing, or boycotts, unavailability of equipment from vendor, changes requested by Customer, or any other circumstances beyond the reasonable control and without the fault or negligence of the Party affected, the Party affected, upon giving prompt notice to the other Party, shall be excused from such performance on a day-to-day basis to the extent of such prevention, restriction, or interference (and the other Party shall likewise be excused from performance of its obligations on a day-to-day basis until the delay, restriction or interference has ceased), provided however, that the Party so affected shall use diligent efforts to avoid or remove such causes of non-performance and both Parties shall proceed whenever such causes are removed or cease.

14. Adoption of Agreements

BellSouth shall make available, pursuant to 47 USC § 252 and the FCC rules and regulations regarding such availability, to Momentum any interconnection, service, or Network Element provided under any other agreement filed and approved pursuant to 47 USC § 252, provided a minimum of six months remains on the term of such agreement. The Parties shall adopt all rates, terms and conditions concerning such other interconnection, service or network element and any other rates, terms and conditions that are legitimately related to or were negotiated in exchange for or in conjunction with the interconnection, service or network element being adopted. The adopted interconnection, service, or network element and agreement shall apply to the same states as such other agreement. The term of the adopted agreement or provisions shall expire on the same date as set forth in the agreement that was adopted.

15. Modification of Agreement

- 15.1 If Momentum changes its name or makes changes to its company structure or identity due to a merger, acquisition, transfer or any other reason, it is the responsibility of Momentum to notify BellSouth of said change and request that an amendment to this Agreement, if necessary, be executed to reflect said change.
- 15.2 No modification, amendment, supplement to, or waiver of the Agreement or any of its provisions shall be effective and binding upon the Parties unless it is made in writing and duly signed by the Parties.
- 15.3 In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of Momentum or BellSouth to perform any material terms of this Agreement, Momentum or BellSouth may, upon written notice require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within ninety (90) days after such notice, the Dispute shall be referred to the Dispute Resolution procedure set forth in this Agreement.